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No. 97-777

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WEBCOR PACKAGING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE LABOR POLICY ASSOCIATION AND MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Labor Policy Association and the Manufacturers Alliance for Productivity and Innovation respectfully submit this brief *amici curiae* with the consent of all parties.* The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250

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* Counsel for *amici curiae* Labor Policy Association (LPA) and Manufacturers Alliance for Productivity and Innovation (the Alliance) authored this brief in its entirety. No person or entity, other than LPA and the Alliance, made a monetary contribution to the preparation or submission of the brief.

of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

Manufacturers Alliance for Productivity and Innovation (the Alliance) is a nonprofit research organization supported by some 500 manufacturing companies from a broad range of industries. These members range in size from relatively small, single product manufacturers to very large, highly diversified companies with annual sales revenues exceeding $1 billion. Roughly one-quarter of the Fortune Magazine 500 largest U.S. industrial companies are members of the Alliance, and almost every firm in the large manufacturer sector that has won the prestigious Malcolm Baldrige National Quality Award is an Alliance member. Alliance companies are on the leading edge of the rapid changes in U.S. industry that are central to the nation's trade, competitiveness, and standard of living. Employee involvement—the issue in this case—is a key component in the total quality management movement in the United States. The Alliance maintains a standing council, comprised of executives from its member companies who are responsible for corporate or major unit quality improvement, devoted to such quality issues.

The members of LPA and the Alliance all are employers subject to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and virtually all have established employee involvement or participation structures in order to increase productivity by involving employees in the critical decisionmaking of the enterprise and, ultimately, to keep the company competitive in today's global marketplace. As a result, LPA and the Alliance are deeply concerned about the decision below, in which the court enforced a National Labor Relations Board order requir-

ing the disestablishment of one such employee involvement structure.

Because of their interest in the development of the nation's labor laws, both LPA and the Alliance have participated as *amicus curiae* in cases before this Court, the United States Courts of Appeals, and the National Labor Relations Board. *E.g. NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).

Thus, LPA and the Alliance have an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of their experience, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in the Petition for Certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Petition involves an issue of vital national concern: the extent to which employees lawfully may participate in the management and critical decisionmaking of their companies under the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.*

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization . . . ." The Act further provides that the term "labor organization" includes:

> any organization of any kind, or any agency or employee representation committee or plan, in which

> employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5).

Although these provisions originally were drafted to prohibit "company" or "sham" unions—*i.e.* those established by employers to supplant legitimate unionization—rulings by the National Labor Relations Board (NLRB or the Board) and the lower federal courts have made it increasingly unclear as to what extent these statutory provisions prohibit modern "employee involvement" or "employee participation" structures.

The importance of this issue can scarcely be overstated. It is estimated that nearly 30,000 U.S. businesses have established employee involvement structures in some form, a number comprising 75% of all American business including 96% of all large companies. Moreover, it is now generally accepted that employee involvement is a critical if not essential element for success in today's global marketplace. Indeed, the issue is so important to the national economy that few questions of federal labor law have generated as much scholarly interest and concern as the legality of employee involvement.

Unfortunately, despite the importance of the question, this Court has not yet had the opportunity to address the issue fully. More unfortunately, the attempts by the NLRB and the lower courts to resolve the issue have utterly failed. Specifically, the Board has failed to provide meaningful and rational guidance regarding the extent to which employee involvement structures constitute statutory labor organizations; has refused to address whether organizations must act in a representational capacity for the employees in order to constitute labor organizations; and, has erroneously disregarded employer motive and employee perceptions in determining whether an employer has unlawfully dominated a labor organization.

Because the NLRB and lower courts have failed to articulate a rational policy that is consistent with the NLRA with respect to the legality of employee involvement, and because of the national importance of the issue, this Court should review this case. Moreover, although these issues recently have seen significant debate in the public policy arena, the issues presented in this Petition nonetheless are questions of *existing federal law* that properly are before the Court.

REASONS FOR GRANTING THE WRIT

I. THE EXTENT TO WHICH EMPLOYEE INVOLVEMENT STRUCTURES CONSTITUTE LABOR ORGANIZATIONS WITHIN THE MEANING OF SECTION 2(5) OF THE NLRA IS AN ISSUE OF VITAL NATIONAL CONCERN THAT SHOULD BE DEFINITIVELY RESOLVED BY THIS COURT

A. The Extent to Which Employee Involvement Structures Constitute Statutory Labor Organizations Is a Question of Vital National Concern

This case involves a question of federal labor law that is of vital national interest and concern—the extent to which employee "involvement" or "participation" structures constitute labor organizations under the NLRA.

The magnitude of this issue is simply enormous. Today, involving employees in the management of the company is well-recognized as an important, if not essential, means of keeping companies competitive in the global economy. An estimated "30,000 companies now have these joint, cooperative programs in workplaces across the country. They cover 75% of all employers, and 96% of the Nation's biggest employers." 142 Cong. Rec. S7618 (daily ed. July 10, 1996) (Statement of Senator Kennedy). *See also* H.R. Rep. No. 104-248, at 10 (1995).

The raw numbers do not tell the whole story, however, and the qualitative value of the structures at issue in this

case also is indicative of their importance. During the past thirty years, American management philosophy and practice has changed dramatically. Increasingly open world markets and technological developments in communication and transportation have made the world smaller. Consequently, American companies have been forced to participate in a global marketplace that will not tolerate inefficiency.

In order to compete in this new marketplace, corporations have had to adapt and change. In many cases, employers have had to adopt elements of the successful management strategies of their foreign competitors. A principal aspect of this metamorphosis has been the abandonment of the traditional, top-down, dictatorial style of management that pervaded American companies during the first three-quarters of this century. In its place, employers have increasingly sought to involve their workers in the management process through the use of employee involvement structures or teams.

> Over the past decade, there has been a major shift in management philosophy and practice in many firms and other organizations form the old "Theory X" military, chain of command model to "Theory Y," involving participative management and the use of employee involvement (EI) systems.

John W. Kendrick, *Policy Implications of the Slowdown in U.S. Productivity Growth, reprinted in*, Productivity Growth and the Competitiveness of the American Economy 75, 102 (Stanley W. Black ed., 1989).

The reason for the philosophical shift is simple:

> In a traditional, hierarchical organization, the primary role of employees is to comply with direction. The newer approach realizes that we expect and, in fact, need our employees to be active participants in improving business performance. . . . These two mind-sets have very different implications for the way we think about people. The traditional mind-set

> stresses control issues, particularly cost control. It regards people as a cost of doing business . . . . The emerging mind set suggests that we view people as assets—and assets should be developed. Thus encouraging our employees' creativity and capabilities can be a strategic method for improving our competitive position.

Jerry L. McAdams & Elizabeth J. Hawk, Capitalizing on Human Assets 9 (1992).

Employee involvement is a management tool that is designed to increase quality, productivity, and efficiency, and generally make the company better. Employee involvement is not just a management philosophy, however; it is a recognition of the modern workplace reality that management does not always know what is best and that the interests of workers and management are not always adverse.

Workers—as the individuals most intimately involved with production and customer satisfaction—possess valuable insight into means of improving the company. Company improvement, in turn, is inseparably intertwined with many interests that are important to employees—*i.e.*, safety, morale, profitability and job security.

Thus, although the purpose of employee involvement is productivity and efficiency, issues that must inevitably be considered to achieve those goals include safety, scheduling, incentives and all other conditions of employment that affect productivity, quality, and efficiency. *See Electromation, Inc.*, 309 N.L.R.B. 990, 1008 (Member Raudabaugh, concurring) ("It is hard to imagine an employee committee that would be able to avoid these matters completely. Even if the committees stated purpose is to deal only with such entrepreneurial concerns as product quality and workplace efficiency, it seems clear that the committee, in order to achieve its purpose, would have to consider one or more of the subjects [that would bring it within the Section 2(5) definition of labor organization]").

Because the interests of employees often coincide with management's, workers can also benefit from employee involvement in such areas as increased safety, better scheduling, improved morale, increased profits, and greater job-satisfaction. These are *collateral* benefits, however, and not the result of interactions with a group of employees *representing the interests of the workers.* Rather, these benefits spring from the commonality of interests between workers and management and are brought about through input from a group of employees *acting in the interests of the company.* In any event, the issues involved in this case have concrete importance for workers and management alike.

Finally, even if the qualitative importance and sheer volume of these programs do not, by themselves, sufficiently convey the significance of this issue, the academic treatment of the question certainly should. Few issues of federal labor law have generated as much concern and interest as the legality of employee involvement.[1]

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[1] *See, e.g.*, Rafael Gely, *Whose Team are You On? My Team or My Team?* 49 Rutgers L. Rev. 323 (1997); Nancy K. Kubasek, Wetley J. Hiers, Shannon T. Browne & Carrie Williamson, *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 Harv. J. on Legis. 53 (1997); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DePaul Bus. L.J. 159 (1996); Madelyn C. Squire, *Electromation: A Metaphor for the Ills of the NLRA—Is a Representation Standard a Cure?*, 73 U. Det. Mercy L. Rev. 209 (1996); Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. Corp. L. 657 (1996); Jon Blumenthal, *Remedying Electromation, Inc. v. NLRB and its Progeny: The Future of Employee Participation Programs*, 5 Kan. J.L. & Pub. Pol'y 193 (1996); Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 Notre Dame L. Rev. 216 (1996); William B. Gould, IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 Creighton L. Rev. 3 (1996); A.B. Cochran, III, *We Participate, They Decide: The Real Stakes in*

As one can clearly see, the extent to which employee involvement structures constitute labor organizations is a question of vital national concern.

B. The Extent to Which Employee Involvement Structures Constitute Statutory Labor Organizations Has Not Been Fully Resolved by This Court

Thirty years ago, this Court addressed, in part, what it considered to be an important question of federal labor law—the definition of "labor organization" under Section

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Revising Section 8(a)(2) of the National Labor Relations Act, 16 Berkeley J. on Employment & Lab. J. 458 (1995); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. Cin. L. Rev. 1379 (1995); Samuel Estreicher, *Employee Involvement and the Company Union Prohibition: The Case For Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125 (1994); Robert B. Moberly, *The Worker Participation Conundrum, Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 Wash. L. Rev. 331 (1994); Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 Harv. L. Rev. 678, 685 (1994); John S. Lapham, *Enhancing Employee Productivity After Electromation and Dupont*, 45 J. of Urban and Contemporary L. 255 (1994); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. Rev. 1127 (1993); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 Yale L.J. (1993); Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 Geo. Wash. L. Rev. 1812 (1993); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 U.C.L.A. L. Rev. 571 (1992); Steven I. Locke, Note, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.*, 10 Hofstra Lab. L.J. 375 (1992); Shaun G. Clark, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 Yale L.J. 2021 (1987); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662 (1983).

2(5) of the NLRA, 29 U.S.C. § 152(5). *See NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210 (1959). That section provides that the term labor organization includes:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added).

In *Cabot Carbon*, the Court concluded that the critical phrase "dealing with" was broader than the term "bargaining with," and therefore an employee committee could be found to be a statutory labor organization even if it "avoided the usual concept of collective bargaining." *Cabot Carbon*, 360 U.S. at 210-11. However, while the Court was clear as to what "dealing with" is not—*i.e.*, "dealing with" is not synonymous with "bargaining with"—it was equally unclear as to what "dealing with" is. In other words:

> *Cabot Carbon*'s rejection of the notion that "dealing with" is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if "dealing with" is less than bargaining, what is it more than?

Electromation, Inc., 309 N.L.R.B. 990, 1002 (Member Devaney, concurring). A meaningful and authoritative answer to this question is imperative.

C. Whether an Employee Involvement Structure Constitutes a Statutory Labor Organization Almost Invariably Is Determinative of the Structure's Legality

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), provides that "it shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation

or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2).

The NLRB has been quite clear as to what constitutes "domination" as contemplated in the Act.

> Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.

Electromation, Inc., 309 N.L.R.B. 990, 995 (1992) (emphasis added). In making the domination determination, the Board examines factors such as whether the employer initiated the group or team (Pet. App. at 25a), the degree to which management sets the agenda (*id.* at 24a), and the composition and selection of members (*id.* at 24a-25a). Significantly, the employer's motive for instituting the program, and whether employees would reasonably perceive the program as a substitute for collective-bargaining are not considered relevant to the 8(a)(2) analysis. *See Electromation*, 309 N.L.R.B. at 995.

Although *amici* disagree with the Board's method for determining "domination," [2] it is clear that under the

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[2] *Amici* believe that the Board erroneously found itself compelled to disregard criteria such as employer motive in determining 8(a)(2) violations by this Court's decision in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939). As explained more fully below, we agree with Member Raudabaugh that the Board is incorrect, and "that there is substantial doubt that the Supreme Court would now decide *Newport News* exactly as the Court had decided it in 1938." *Electromation*, 309 N.L.R.B. at 1012 (Member Raudabaugh, concurring).

Board's analysis, employee involvement or participation programs almost invariably will run afoul of Section 8(a)(2). This is because employee involvement structures are *management tools*, not mechanisms for dealing with employees or their representatives in the same sense that traditional labor organizations deal with employers. The purpose of employee involvement programs is to improve quality, efficiency, and productivity—*i.e.* to improve the company itself. As a result, such programs nearly always are creations of management.[3]

Similarly, the very nature of the programs—*i.e.* employee *involvement* or employee *participation*—indicates that membership cannot generally be limited exclusively to workers.[4] The essence of these programs is that employees become *involved in*, or *participate in*, the *management of the company for the benefit of the company.*

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[3] As a practical matter, the instances where employees unilaterally, and on their own initiative, create programs to improve quality, productivity, and efficiency are, to say the least, highly unusual. In a survey conducted by Michael LeRoy of companies that maintained employee involvement programs, employees created the "teams" only 2.6% of the time. *See* Michael H. LeRoy, *"Dealing With" Employee Involvement In Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromation*, 73 Notre Dame L. Rev. 31, 77 (1997).

[4] One form of employee involvement, the so-called self-directed work team, involves limited management participation. This type of team appears to be lawful under Board precedent. *See General Foods*, 232 N.L.R.B. 1232 (1977). Self-directed work teams, however, are a somewhat limited form of employee involvement structure that is not suitable for every workplace. *See* Michael LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromation*, 73 Notre Dame L. Rev. 31, 75 (1997) (empirical study indicated that eighty-five percent of employee involvement programs have management participation). Even self-directed work teams, however, are subject to some management constraints. As a practical matter, management ultimately will maintain veto power over these structures even if, in a particular case, that veto power has not been exercised.

Such a system will almost always require management participation: that is precisely what employees are being involved in. Moreover, because the workers are participating in the management of the firm—as opposed to *representing employees* (in the true sense of a labor organization)—the agenda unavoidably must be controlled by management to some degree. *See, e.g., Electromation*, 309 N.L.R.B. at 1010 (Member Raudabaugh, concurring) ("Contemporary EPPs [employee participation plans] are often set up by employers with the lawful motives of enhancing morale, communication, product quality, and increasing productivity. To achieve these goals, the employers usually retain some degree of control over the EPPs.")

As a result, under the NLRB's present interpretation of Section 8(a)(2), employee involvement structures that are found to be "labor organizations" almost invariably will be found to be dominated by the employer.

D. The NLRB Has Been Unable to Provide Meaningful or Rational Guidance on the Extent to Which Employee Involvement Structures Constitute Labor Organizations Under Section 2(5) of the NLRA

Despite the importance of the issue, the National Labor Relations Board, as well as the lower federal courts, have been unable to provide meaningful or rational guidance on the extent to which employee involvement structures constitute labor organizations under Section 2(5).

The statute defines the term labor organization to include:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added). As explained above, this Court, has determined the upper limit of the term "dealing with": "dealing with" is something less than "bargaining with." *See Cabot Carbon*, 360 U.S. at 210. However, the Board has consistently failed to provide a satisfactory interpretation of the term's lower limit.

As the Board again explained in its decision below,

> dealing with contemplates "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation, Inc.*, 309 N.L.R.B. 990, 995 fn.21 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). The bilateral mechanism thus ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management and management responds to these proposals by word or deed. *E.I. DuPont & Co.*, 311 N.L.R.B. 893, 894 (1993).

(Pet. App. at 21a).

In short, according to the Board, a company may lawfully maintain an employee involvement structure so long as it does not consider—actually or apparently—any proposals that the structure generates. Whatever Congress intended to mean in Section 2(5), it certainly cannot be this. Despite the vast experience that the members of *amici* possess with regard to business and human resource management, and quality improvement, we have been wholly unable to find the utility of a law that allows us to implement a program *on the condition that we totally disregard the results of that program.*

In an attempt to reduce the Orwellian impression that this policy evinces, the Board readdressed the issue at length in *E.I. duPont de Nemours & Co.*, 311 N.L.R.B. 893 (1993), to "show that there is some room for lawful cooperation under the Act." *Id.* at 893. The *duPont* holding, however, is more style than substance.

According to the Board, employee committees created for the purpose of "develop[ing] a whole host of ideas" are not "dealing with" the employer. *Id.* at 894. "Management may glean some ideas from this process, and indeed may adopt some of them. If the group makes no proposals, the 'brainstorming' session is not dealing and therefore not a labor organization." *Id.*

Although literally, the words "proposal" and "idea" can have separate meanings, in this context, the Board creates a distinction without a difference. As a practical matter, there is no difference between employee conclusions phrased in terms of ideas and those phrased as proposals. In other words, it is hard to imagine how a statement to the effect: "I have an idea, maybe we could . . ." would constitute a lawful "idea" as opposed to an unlawful "proposal." In any event, Congress could hardly have intended that such an important question turn on such an insignificant distinction.

The Board's meaningless and irrational definition of "dealing with," although sufficient by itself, is not the only Board failure that warrants review of this issue by the Court. The Board consistently has failed to decide whether an employee involvement structure must act in a representational capacity in order to constitute a labor organization. *See Electromation, Inc.*, 309 N.L.R.B. at 994 n.20; (Pet. App. at 23a n.6). Petitioner has thoroughly and persuasively addressed the legal arguments on this point, *see* (Pet. at 8-11), and *amici* will not repeat those concerns here. Nevertheless, employee involvement programs possess certain general characteristics, discussed below, that are vital to an analysis in this area.

Unlike labor unions, employee involvement structures *do not* establish mechanisms in which workers represent the *interests of other workers.* On the contrary, employee

involvement entails worker participation in the management of the company *in the interest of the company.*[5]

It may well be that the views expressed by employees who serve in employee involvement structures are *representative of* those of other employees and as such may be of considerable value to the company in assessing the potential effects of policies being considered. However, this is far different from the kind of representation that must be provided by labor organizations. Unlike employee involvement structures, unions represent the *interests* of the employees in dealings with the employer. It is employer attempts to impose that kind of representation on employees that Section 8(a)(2) was intended to prohibit.[6]

In sum, because the NLRB has been unable to articulate a rational and meaningful standard regarding the extent to which employee participation programs constitute statutory labor organizations, and because these programs are essential to economic success in the global economy, this Court should review the issue.

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[5] Contrary to the conclusion of the Board, the fact that, in this case, the employee members of the Plant Council were elected by the workers does not establish, per se, that these individuals acted in a representational capacity. Election is simply a method of selection which may or may not involve representation. For example, many state judges are elected to office, not because the judges represent particular interests or constituents, but because the voters have determined that they are the most qualified for the job. Similarly, athletes are elected to their respective Halls of Fame, not because they represent other athletes, but because they are the most deserving of the position.

[6] The following example helps illustrate the distinction between representing views and representing interests. The production-line workers of company X generally agree, and propose to management, a particular method of production that is less labor intensive and more efficient. This view, however, which is representative of the *views* of the workers, nonetheless could be in direct conflict with the *interests* of the workers to the extent that certain workers could lose their jobs if the plan was implemented.

II. THE NLRB HAS ERRONEOUSLY CONCLUDED THAT IT IS COMPELLED BY A DECISION OF THIS COURT TO DISREGARD EMPLOYER MOTIVE AND EMPLOYEE PERCEPTIONS IN DETERMINING WHETHER AN EMPLOYER HAS DOMINATED THE FORMATION AND ADMINISTRATION OF A LABOR ORGANIZATION IN VIOLATION OF SECTION 8(a)(2)

The NLRB has erroneously concluded that it is compelled by this Court's decision in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939), to disregard factors such as employer motive and employee perception in determining whether an employer has dominated the formation and administration of a labor organization in violation of Section 8(a)(2). *See Electromation, Inc.*, 309 N.L.R.B. at 995 n.24; *id.* at 1005 n.5 (Member Oviatt, concurring). Since *Newport News* was decided, however, there have been significant changes in both the law and economy that require re-examination of this issue by the Court.

As originally drafted, Section 8(a)(2) was designed to arrest the employer practice of establishing "sham" unions for the purpose of preventing employees from choosing real union representation. Indeed, during consideration of the Wagner Act in 1935, Senator Wagner cited studies showing that more than two-thirds of the "company unions" then in existence were established after enactment of the National Industrial Recovery Act of 1933, which had been designed to recognize the right of employees to bargain collectively. 79 Cong. Rec. 7650 (1935), *reprinted in*, 1 N.L.R.B., *Legislative History of the National Labor Relations Act*, 1935 (1959). This fact was confirmed by a 1935 study conducted by the Bureau of Labor Statistics which found that 64% of these company unions were formed in response to union activity. Bureau of Labor Statistics, *Characteristics of Company Unions, 1935* 62 (1937).

Modern employee involvement structures, however, are in no way like the company unions prevalent during the first half of this century. *See, e.g.*, Michael LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromation*, 73 Notre Dame L. Rev. 31, 78 (1997) (extensive survey "disclos[ed] no evidence that teams are like company unions from the 1930s"). The purpose of these programs is to involve employees in the management of the company in order to increase quality, productivity, and efficiency, not to supplant legitimate unionization.

Furthermore, since the Court's decision in *Newport News*, the law itself has changed. Passage of the Taft-Hartley Act in 1947 dramatically altered the fundamental purpose of the NLRA from a policy of industrial peace through unionization to a policy of industrial peace through employee free choice. When legitimate employee involvement structures are established—*i.e.* those programs with neither the purpose or effect of inhibiting employee free choice—they should not run afoul of federal labor law. Indeed, the prevalence of employee involvement structures in *unionized* workplaces demonstrates that employee participation and employee free choice can easily co-exist. By the same token, employees freely choosing non-unionized workplaces should not be barred from participating in the management and critical decisionmaking of their companies.

Newport News, which was decided in 1939, could not have considered these important changes in the law and economy. We agree with Member Raudabaugh that "there is substantial doubt that [this Court] would now decide *Newport News* exactly as [it] did in 1938." *Electromation, Inc.*, 309 N.L.R.B. at 1012 (Member Raudabaugh, concurring).

Because the Board nevertheless finds itself bound by this Court's prior decision, and because legitimate em-

ployee involvement is essential for success in today's economy, the Court should address whether employer motive and employee perceptions are relevant factors in determining whether employee involvement structures violate Section 8(a)(2) of the NLRA.

III. THE ISSUES INVOLVED IN THIS CASE ARE QUESTIONS OF LAW THAT PROPERLY SHOULD BE RESOLVED BY THIS COURT

The issues presented in this case—which ultimately will determine the extent to which employee involvement structures are lawful under the NLRA—are questions of existing law, not public policy, that properly should be resolved by this Court.

It is true that these issues have created much interest and discussion in the public policy arena as well. In fact, bills have been generated in each of the last two Congresses addressing the issue. *See* Teamwork for Employees and Managers Act of 1997, S. 295, 105th Cong. (1997); Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1995). Nevertheless, this continuing public policy debate concerning what the law *should be*, does not reduce the need for a definitive statement of what the law *is*. On the contrary, if the current legislative debate on this issue demonstrates anything at all, it demonstrates only that no one can state with certainty the extent to which employee involvement is permitted under *existing law*.[7]

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[7] *Compare* S. Rep. No. 105-12, at 12 (1997) ("The need for clarification of the legality of employee involvement programs has since moved far beyond the specific facts of the *Electromation* decision. The breadth of the relevant provisions of the NLRA left employers and employees in a legal never-never land."); H.R. Rep. No. 104-248, at 11 (1995) ("The breadth of the relevant provisions of the NLRA combined with the confusion created by the four opinions in the [*Electromation*] decision have left the myriad employers and employees attempting to establish cooperative arrangements in the workplace in a legal never-never land."); *and*

That is precisely the kind of question that is appropriate for review by this Court. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ("it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.")

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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142 Cong. Rec. S7487 (daily ed. July 9, 1996) (statement of Sen. Warner) (". . . in the course of the hearing in the Small Business Committee, we had employers come up who went ahead and violated the law knowingly [by establishing employee participation programs] and take the risk of being sued . . ."); *with* S. Rep. No. 105-12, at 31 (1997) (minority views) ("The majority would have us believe that lack of clarity in the law has thrown employers into doubt about the legality of employee involvement, justifying the drastic revision they seek. There is no serious problem with clarity now."); H.R. Rep. No. 104-248, at 31 (1995) (minority views) ("The majority contends that the NLRB's decision in *Electromation, Inc.* interferes with the adoption of these forms of employee involvement. That is simply not true . . ."); *and* 142 Cong. Rec. S7615 (daily ed. July 10, 1996) (statement of Sen. Murray) ("Employee committees, work teams, and quality circles that discuss questions of efficiency, productivity, quality, and work practices are currently allowed. Nothing prevents these teams from existing today . . .").